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# Learning on the Job: *Glatt v. Fox Searchlight Pictures, Inc.*'s Primary Beneficiary Test and Its Implications for Harassment and Discrimination Protections for Unpaid Interns under Title IX

Irene Hickey Sullivan<sup>†</sup>

## ABSTRACT

*Despite the prevalence of internships in today's economy, the law is unsettled as to whether unpaid interns are entitled to harassment and discrimination protections under federal law. Title VII of the Civil Rights Act of 1964 bars harassment and discrimination from the workplace, but only towards employees. The circuit courts are divided as to what test to apply in determining whether unpaid interns qualify as employees and fall within the scope of Title VII. This Comment argues that the primary beneficiary test the Second Circuit adopted in *Glatt v. Fox Searchlight Pictures, Inc.* best addresses this question by evaluating whether an internship is primarily educational. An unpaid intern has not yet succeeded in bringing a Title VII challenge; however, this Comment argues that the primary beneficiary analysis could support an avenue for recovery under Title IX of the Education Amendments Act of 1972. This Comment demonstrates that if the primary purpose of an internship is educational, then the internship should qualify as an "education program or activity" under Title IX, and therefore protections against gender-based harassment and discrimination come into effect.*

## I. INTRODUCTION

While studying social work at Marymount College in Tarrytown, New York, Bridget O'Connor began working at an unpaid internship at Rockland, a state-operated hospital for the mentally disabled, as required by her major in social work.<sup>1</sup> Ms. O'Connor typically worked at Rockland on Mondays and Wednesdays from approximately 8:00am to 4:30pm, as these times did not conflict with her class schedule. While

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<sup>1</sup> O'Connor v. Davis, 126 F.3d 112, 113 (2d Cir. 1997).

at Rockland, Ms. O'Connor met with patients and documented the results of these meetings in "process recordings," which she then gave to her supervisor.<sup>2</sup> Ms. O'Connor worked with Dr. James Davis, a licensed psychiatrist at Rockland.<sup>3</sup> Over the course of the internship, Dr. Davis displayed highly inappropriate behavior toward Ms. O'Connor. Dr. Davis continually referred to Ms. O'Connor as "Miss Sexual Harassment," which he later explained was a compliment, intending to communicate that Ms. O'Connor "was physically attractive and, as such, was likely to be the object of sexual harassment."<sup>4</sup> He frequently made inappropriate sexual remarks towards her. For example, one morning, Dr. Davis pointed out to Ms. O'Connor that "she and her boyfriend must have had 'a good time' the night before."<sup>5</sup> In another instance, he referenced a newspaper photograph of a woman in only her underwear, and announced that the woman was Ms. O'Connor.<sup>6</sup> He once requested to Ms. O'Connor and other women in the room that they should take part in an "orgy."<sup>7</sup> He also once told Ms. O'Connor to take off her clothes before meeting with him, saying, "Don't you always take your clothes off before you go into the doctor's office?"<sup>8</sup> When Ms. O'Connor complained about Dr. Davis's inappropriate remarks to another supervisor, she was told it was best to just ignore him.<sup>9</sup> Within four months, Ms. O'Connor left Rockland due to the hostile working conditions, and Marymount placed her at another location to complete her internship requirement.<sup>10</sup>

Unpaid internships, such as the one Bridget O'Connor participated in at Rockland, have become increasingly common in the workplace.<sup>11</sup> Many college students, as well as recent graduates, participate in internships at some point during their undergraduate tenure. In 2014, nearly 64% of graduating seniors reported to the National Association of Colleges and Employers (NACE) that they participated in some form

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 113–14.

<sup>6</sup> *Id.* at 114.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 113.

<sup>10</sup> *Id.* at 114.

<sup>11</sup> Hannah Nicholes, Comment, *Making the Case for Interns: How the Federal Courts' Refusal to Protect Interns Means the Failure of Title VII*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 80, 92 (2015).

of internship while earning their bachelor's degree.<sup>12</sup> More than 20 industries, from legal to finance to consulting, host internships today.<sup>13</sup> Of these internships, around 40% are unpaid.<sup>14</sup>

Employers' and students' perceptions of the benefits that come from internships largely explain the rise of these programs in recent years. First, employers use interns to staff positions that were once full-time, particularly since the economic recession of the 2000s.<sup>15</sup> Interns thus increasingly provide companies with much more substantive work than the stereotypical errand-boy serving coffee.<sup>16</sup> Second, companies expend significant resources while recruiting, selecting, and training new interns and seek a return on this investment through the creation of a pool of potential applicants for full-time employment in years to come.<sup>17</sup> Beyond forming a prospective applicant pool, internships also provide employers with an extended period of time to evaluate a future job candidate in her actual work environment and verify that she performs high-quality work.<sup>18</sup>

Students also see value in internships and now consider them to be critical to their career preparation. College career centers advise students that internships provide opportunities to explore career options while allowing them "to gain exposure to potential careers, to develop professional work skills, and to obtain a competitive advantage in the job search."<sup>19</sup> Schools also may provide students with academic credit for their internships or, as in Ms. O'Connor's case, even require internships for graduation from particular programs. Furthermore, students perceive internships not only as a boost, but as an increasingly necessary credential in a competitive job market. Between 2000 and 2010, the annual number of graduates receiving bachelor's degrees increased

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<sup>12</sup> NAT'L ASS'N OF COLLS. & EMP'RS, THE CLASS OF 2014 STUDENT SURVEY (2014), <http://career.sa.ucsb.edu/files/docs/handouts/2014-student-survey.pdf> [<https://perma.cc/PC26-BW2H>].

<sup>13</sup> Nicholes, *supra* note 11, at 92–93.

<sup>14</sup> Michael Pardoe, Comment, *Glatt v. Fox Searchlight Pictures, Inc.: Moving Towards a More Flexible Approach to the Classification of Unpaid Interns Under the Fair Labor Standards Act*, 75 U. MD. L. REV. 1159 (2016) (citing NAT'L ASS'N OF COLLS AND EMP'RS, THE CLASS OF 2015 EXECUTIVE SUMMARY 5 (2015), <https://www.nacweb.org/uploadedfiles/content/static-assets/downloads/executive-summary/2015-student-survey-executive-summary.pdf> [<https://perma.cc/VX3X-6NH6>]).

<sup>15</sup> Beth Braccio Hering, *Why are Internships so Important?*, CNN (Apr. 13, 2010, 11:09 AM), <http://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important/> [<https://perma.cc/6W59-KMEV>].

<sup>16</sup> *Id.*

<sup>17</sup> Nicholes, *supra* note 11, at 94.

<sup>18</sup> *Id.*

<sup>19</sup> *Internships and Externships*, THE UNIVERSITY OF CHICAGO CAREER ADVANCEMENT (Jan. 1, 2017, 12:00 PM), <https://careeradvancement.uchicago.edu/jobs-internships-research/internships-externships> [<https://perma.cc/6SXG-JJZW>].

by 30%, from 1.2 to 1.6 million,<sup>20</sup> far outpacing the country's 9.7% population growth in that same time period.<sup>21</sup> College students who participate in internships are more likely to obtain full-time job offers after graduation and to receive a higher level of compensation than their peers who do not take advantage of such opportunities.<sup>22</sup> NACE found that, in 2014, 52.1% of students who had internship experience received full-time job offers, compared to 38.6% of those who did not have an internship. Internships often provide direct paths to later employment; employers reported to NACE that 55% of interns later become employees.<sup>23</sup>

Although unpaid internships are a common feature of student educational experiences, the law is unclear as to whether these unpaid interns are entitled to federal protection<sup>24</sup> from gender-based harassment and discrimination. Although other forms of discrimination and harassment, such as race, religion, and sexual orientation,<sup>25</sup> are certainly worthy of attention, this Comment focuses specifically on sexual harassment and gender-based discrimination. Currently, the nearly two-thirds of graduating students who participate in unpaid internships over the course of their college careers work without federal protection from gender-based harassment and discrimination at their internship sites.<sup>26</sup> The lack of protection afforded to unpaid interns could have implications for the gender composition of certain occupations.

Title VII of the Civil Rights Act of 1964<sup>27</sup> provides employees with protection from harassment and discrimination in the workplace.<sup>28</sup> To date, only one district court has held that an unpaid intern qualified as

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<sup>20</sup> Brian Burnsed, *Degrees are Great, but Internships Make a Difference*, U.S. NEWS EDUCATION (Apr. 15, 2010, 12:00 AM), <http://www.usnews.com/education/articles/2010/04/15/when-a-degree-isnt-enough> [<https://perma.cc/S7R7-8MEC>].

<sup>21</sup> PAUL MACKUN & STEVEN WILSON, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (Mar. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> [<https://perma.cc/36VH-8J55>].

<sup>22</sup> NAT'L ASS'N OF COLLS. & EMP'RS, *supra* note 12, at 39.

<sup>23</sup> *Id.* at 42.

<sup>24</sup> Some states have passed statutes protecting unpaid interns from harassment and discrimination. *See, e.g.*, Sexual Harassment Protections for Unpaid Interns, TEX. LABOR CODE ANN. § 21.1065 (2015). State law protections are outside the scope of this Comment.

<sup>25</sup> The Seventh Circuit has held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. *See Hively v. Ivy Tech College of Indiana*, 853 F.3d 339 (7th Cir. 2017). The Supreme Court, however, has not yet addressed this question. *Id.* at 340. It is furthermore unclear whether Title IX applies to gay, lesbian, and transgender students. *See, e.g.*, Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bulling of LGBT Students*, 125 YALE L. J. 2006 (2016). Given the uncertainty surrounding the application of Title VII and Title IX to issues of sexual orientation, this Comment excludes these issues from its discussion.

<sup>26</sup> NAT'L ASS'N OF COLLS. & EMP'RS, *supra* note 12.

<sup>27</sup> 42 U.S.C. §§ 2000e–2000e-17 (2012).

<sup>28</sup> Nicholes, *supra* note 11, at 83.

an employee, and that decision was later vacated by the Second Circuit.<sup>29</sup> Without employee status, unpaid interns are not covered under Title VII and therefore cannot invoke federal protections against harassment and discrimination in their workplaces.<sup>30</sup> When courts determine that unpaid interns are not employees, companies can discriminate against them in their hiring processes without fear of repercussions under Title VII, even though these interns comprise a substantial portion of the future hiring pool.<sup>31</sup> In addition, if an employer discriminates against or harasses an intern during the course of the internship, Title VII also does not provide a form of recourse for the intern, even when the ill-treatment causes the intern to terminate her relationship with the internship program.<sup>32</sup>

Circuit courts are currently split regarding what test courts should use to determine whether an unpaid intern is an employee and thus receives harassment and discrimination protection under Title VII. The Second, Fourth, Fifth, and Sixth Circuits use a primary beneficiary test,<sup>33</sup> the Tenth Circuit utilizes a totality of the circumstances test,<sup>34</sup> and the Eleventh Circuit purports to use an economic realities test,<sup>35</sup> although more recently it has also used a primary beneficiary test.<sup>36</sup> This Comment will advocate that the primary beneficiary test the Second Circuit recently adopted in *Glatt v. Fox Searchlight Pictures, Inc.*<sup>37</sup> is superior among these tests.

Following this discussion of the primary beneficiary test, the Comment will then turn to Title IX of the Education Amendments Act of

<sup>29</sup> Jamey Collidge, Comment, “I Mean, You’re Not Staff”: *The Employee Classification Circuit Split and Why the Southern District of New York’s Totality of the Circumstances Test from Glatt v. Fox Searchlight Pictures, Inc. Deserves a Lead Role*, 60 VILL. L. REV. TOLLE LEGE 53, 69–70 (2015) (noting that *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), marked the first time a district court had held an intern was an employee. This decision was ultimately vacated by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2015)).

<sup>30</sup> Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN’S L.J. 95, 96 (2000). An unpaid intern can also use state tort law to bring an action for sexual harassment. See Joanna Stromberg, Comment, *Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN’S L.J. 317 (2003). This approach, however, is outside the scope of this Comment.

<sup>31</sup> Bowman, *supra* note 30, at 96.

<sup>32</sup> See *O’Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997).

<sup>33</sup> See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 532 (2d Cir. 2015); *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989); *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982); *Solis v. Laurelbrook & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011).

<sup>34</sup> See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993).

<sup>35</sup> See *Kaplan v. Code Billing & Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013).

<sup>36</sup> See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1213 (11th Cir. 2015).

<sup>37</sup> *Glatt*, 811 F.3d at 536.

1972 and the protection it affords against sexual harassment and gender-based discrimination in educational settings.<sup>38</sup> This Comment argues that when courts find interns to have a high degree of educational benefit and thus deny Title VII protections under the primary beneficiary test, Title IX protections kick in, as the internship will qualify as an “education program or activity” under Title IX if the internship site receives federal funding in any capacity. Furthermore, if a university sponsors or facilitates an internship at an off-site location that does not receive federal funding, this Comment will argue that this internship also warrants coverage under Title IX, with the sponsoring educational institution facing potential liability.

## II. TITLE VII, TITLE IX, AND PROTECTIONS FROM HARASSMENT AND DISCRIMINATION

### A. The Purpose of Title VII of the Civil Rights Act of 1964

Title VII regulates the relationship between employees and employers in both the private and public sectors.<sup>39</sup> Title VII makes it illegal for employers to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>40</sup> The language of Title VII demonstrates that Congress intended “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . job environments to the disadvantage of minority citizens.”<sup>41</sup> In passing such legislation, Congress did not aim to guarantee a job to every person but to remove “artificial, arbitrary, and unnecessary barriers of employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”<sup>42</sup>

The Supreme Court extended the reach of Title VII beyond discrimination that has an economic or other obvious impact to “the creation or perpetuation of a discriminatory work environment.”<sup>43</sup> Therefore, sex-

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<sup>38</sup> 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

<sup>39</sup> See 42 U.S.C. § 2000e-2(a) (2012).

<sup>40</sup> *Id.*

<sup>41</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

<sup>42</sup> *Id.* at 800–01.

<sup>43</sup> Nicholes, *supra* note 11, at 84 (quoting *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2440

ual harassment that is “so ‘severe or pervasive’ as to ‘alter the conditions of [the victim’s] employment and create an abusive working environment [sic]” creates an actionable harm under Title VII.<sup>44</sup> When employers “knowingly or negligently allow a work environment to become ‘heavily charged’ with discrimination,” they may be held liable under Title VII.<sup>45</sup> When originally enacted, recovery under Title VII was limited to equitable relief in the forms of reinstatement, back pay, and orders to cease the discriminatory practice(s).<sup>46</sup> The 1991 amendments to Title VII allow plaintiffs to also seek compensatory and punitive damages.<sup>47</sup> Compensatory damages are allowed for pecuniary and nonpecuniary losses and are capped between \$50,000 and \$300,000, depending on the size of the offending institution.<sup>48</sup>

#### B. The Legal Definition of Employee

Courts have interpreted Title VII protections to apply only to “employees.”<sup>49</sup> Title VII circularly defines the term “employee” as “an individual employed by an employer.”<sup>50</sup> As a result, how courts determine which workers qualify as employees is critical for determining whether Title VII protections apply. The Supreme Court has not yet directly addressed the question of whether unpaid interns qualify as employees.<sup>51</sup> However, in *Walling v. Portland Terminal Co.*,<sup>52</sup> the Court held that unpaid trainees learning how to operate railcars were not employees, and were therefore not covered under the minimum wage provision of the Fair Labor Standards Act (FLSA).<sup>53</sup> The Court articulated several reasons for its conclusion. First, the trainees did not “displace any of the regular employees,” their work did “not expedite the company business,” and sometimes their work would “actually impede and retard it.”<sup>54</sup> Second, trainees did not necessarily expect to receive employment after the completion of their training.<sup>55</sup> There was also no evidence that “trainees ever expected to receive . . . any remuneration for the training

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(2013)).

<sup>44</sup> *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)).

<sup>45</sup> *Id.* (quoting *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971)).

<sup>46</sup> Stromberg, *supra* note 30, at 325.

<sup>47</sup> 42 U.S.C. § 1981a-(a)(1).

<sup>48</sup> 42 U.S.C. § 1981a-(b)(3).

<sup>49</sup> Nicholes, *supra* note 11, at 82.

<sup>50</sup> 42 U.S.C. § 2000e(f) (2012).

<sup>51</sup> See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2015).

<sup>52</sup> 330 U.S. 148 (1947).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 149–50.

<sup>55</sup> *Id.* at 150.



period other than the contingent allowance.”<sup>56</sup> Ultimately, the Court concluded that the “railroads receive no ‘immediate advantage’ from any work done by the trainees.”<sup>57</sup> In conducting its analysis, the Court did not imply that any particular fact relevant to *Portland Terminal* was determinative for inquiries in other employment contexts.<sup>58</sup>

Drawing heavily on the court’s reasoning in *Portland Terminal*, the Department of Labor (DOL) issued Fact Sheet #71 in 2010 to provide guidance for unpaid interns in the for-profit sector.<sup>59</sup> The DOL guidelines state that:

an employment relationship does not exist if *all* of the following factors apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>60</sup>

Although this set of factors may be a helpful guideline in some cases, the Second Circuit concluded in *Glatt* that Fact Sheet #71 is not legally dispositive.<sup>61</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 153.

<sup>58</sup> *See id.* at 150–53. *See also* *Glatt v. Fox Searchlight*, 811 F.3d 528, 537 (2d Cir. 2016) (“Nothing in the Supreme Court’s decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace.”).

<sup>59</sup> U.S. DEPT OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> [<https://perma.cc/6NL7-X6ZJ>] (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> *Glatt*, 811 F.3d at 536 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (The weight

### C. The Unpaid Intern FLSA Circuit Split and the *Glatt* Primary Beneficiary Test

To date, no appellate court has upheld a decision to award employee status to an intern.<sup>62</sup> Despite the uniformity in this result, circuit courts are divided regarding what test to apply when determining whether a worker is an employee. The FLSA, which sets out various employment relations (including minimum wages and requirements on overtime pay),<sup>63</sup> and Title VII define “employee” in the same circular language: “an individual employed by an employer.”<sup>64</sup> The Supreme Court has instructed lower courts to interpret the term in these and other statutes using the common law of agency.<sup>65</sup> Therefore, lower courts use similar analyses in evaluating whether a worker is an employee under each statute.<sup>66</sup> The cases in this section interpret the meaning of “employee” in the context of the FLSA, but the same reasoning should be applicable to Title VII.

In the FLSA context, courts generally utilize one of three different tests: (1) a totality of the circumstances test, (2) an economic realities test, or (3) a “primary purpose” or “primary beneficiary” test.<sup>67</sup> The totality of the circumstances test looks to the factors in Fact Sheet #71 to determine whether someone is an unpaid intern, considering which party each factor favors and then balancing the factors against one another.<sup>68</sup> It typically differs from the Fact Sheet #71 in that the DOL requires satisfaction of all the factors in its fact sheet, whereas a court applying the totality of the circumstances test instead weighs the factors against one another.<sup>69</sup>

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given to the Administrator’s judgment depends on “all those factors which give it power to persuade.”)).

<sup>62</sup> See *supra* note 29 and accompanying text.

<sup>63</sup> U.S. DEPT OF LABOR, WAGE & HOUR DIV., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (Sept. 2016), <https://www.dol.gov/whd/regs/compliance/hrg.htm> [<https://perma.cc/5TSE-7UFR>].

<sup>64</sup> 29 U.S.C. §203(e) (2002). See also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (describing the same definition under ERISA as “completely circular and explain[ing] nothing”).

<sup>65</sup> *Ware v. United States*, 67 F.3d 574, 576 (6th Cir. 1995) (citing *Darden*, 503 U.S. at 322–24).

<sup>66</sup> See David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 239–40 (2002). For further discussion of the nuances distinguishing the various tests that lower courts use to determine employee status under Title VII and FLSA and an argument that courts should use the same test in both contexts, see Elizabeth Heffernan, Comment, *It Will Be Good For You, They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757 (2017).

<sup>67</sup> Collidge, *supra* note 29, at 54.

<sup>68</sup> *Id.* at 68.

<sup>69</sup> *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993).

The economic realities test looks to the “extent to which the putative employee is dependent, as a matter of economic reality, on the services that he or she is rendering to the putative employer.”<sup>70</sup> When exercising the economic realities test, courts consider factors such as “the degree of the alleged employer’s right to control the manner in which the work is to be performed” and “the alleged employee’s opportunity for profit or loss depending on his managerial skill.”<sup>71</sup> Courts frequently use the economic realities test in the context of distinguishing employees from independent contractors. In 2013, the Eleventh Circuit purported to apply this test to cover the question of unpaid interns in *Kaplan v. Code Blue Billing & Coding, Inc.*,<sup>72</sup> but the court’s analysis merely mimicked the primary beneficiary test.<sup>73</sup> Like the court in *Glatt*, the court in *Kaplan* focused on educational aspects of the internship, and noted that the plaintiffs “did in fact engage in hands-on work for their formal degree program” and “received academic credit for their work.”<sup>74</sup> The court further stated, “Plaintiffs caused Defendants’ businesses to run less efficiently and cause duplication of effort.”<sup>75</sup> This analysis mirrors the factor from *Glatt* that interns’ work “complements, rather than displaces, the work of paid employees.”<sup>76</sup> The Eleventh Circuit’s decision *Schumann v. Collier Anesthesia, P.A.*<sup>77</sup> reinforces this analysis; in this case, the Eleventh Circuit addressed unpaid internships by citing *Glatt* with no mention of *Kaplan*.<sup>78</sup>

Last, the Second Circuit recently adopted a primary beneficiary test. In *Glatt*, the United States District Court for the Southern District of New York originally concluded that the plaintiffs, unpaid interns working on the film *Black Swan*, were employees. It reasoned that the first four DOL factors weighed in their favor.<sup>79</sup> The Second Circuit, however, vacated the decision of the District Court,<sup>80</sup> and adopted a primary beneficiary test. It stated that “an employment relationship is not created when the tangible and intangible benefits provided to the intern

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<sup>70</sup> *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013).

<sup>71</sup> Elizabeth R. Langton, Comment, *Workplace Discrimination as a Public Health Issue: The Necessity of Title VII Protections for Volunteers*, 83 FORDHAM L. REV. 1455, 1475–76 (2015) (quoting *Real v. Driscoll Strawberry Assocs. Inc.*, 603 F.2d 748, 754 (9th Cir. 1979)).

<sup>72</sup> 504 F. App’x 831 (11th Cir. 2013).

<sup>73</sup> *See id.* at 834–35.

<sup>74</sup> *Id.* at 834.

<sup>75</sup> *Id.*

<sup>76</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

<sup>77</sup> 803 F.3d 1199 (11th Cir. 2015).

<sup>78</sup> *Id.* at 1210.

<sup>79</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

<sup>80</sup> *Glatt*, 811 F.3d at 538.

are greater than the intern's contribution to the employer's operation."<sup>81</sup> The *Glatt* court declined an invitation from the DOL to utilize the six-prong test from Fact Sheet #71, because it "attempts to fit *Portland Terminal's* particular factors to all workplaces and because the test is too rigid for our precedent to withstand."<sup>82</sup>

In adopting the primary beneficiary test, the Second Circuit articulated "a set of non-exhaustive factors to aid courts in determining whether a worker is an employee for purposes of the FLSA."<sup>83</sup> These factors include:

1. The extent to which the intern and the employer clearly understand there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the interns' formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.<sup>84</sup>

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<sup>81</sup> *Id.* at 535.

<sup>82</sup> *Id.* at 536.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

The *Glatt* court explained in its conclusion: “The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern’s formal education.”<sup>85</sup> Although there is some overlap between the two tests, the court focused on the educational aspects of the internship to better reflect “the role of the internships in today’s economy than the DOL factors.”<sup>86</sup> The court reasoned that the purpose of an internship is to “integrate classroom learning with practical skill development in a real-world setting.”<sup>87</sup>

#### D. The Purpose of Title IX of the Education Amendments Act of 1972

In addition to the relief that Title VII affords, Title IX<sup>88</sup> provides protections for harassment and discrimination specifically for incidents concerning gender in educational settings.<sup>89</sup> In relevant part, Title IX reads, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>90</sup> “Title IX has been construed to prohibit gender discrimination against students and employees alike in educational institutions that receive federal funding.”<sup>91</sup> The critical question for liability under Title IX thus becomes whether an internship program can qualify as an “education program or activity.”

Although early interpretations of Title IX assumed that it only applied to the particular division or program within a university receiving federal funds, in 1988, Congress amended Title IX to define “program or activity”:<sup>92</sup>

- (1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or
- (ii) The entity of such a State or local government that distributes Federal financial assistance and each such department or agency . . . to which the assistance [to a State or local government] is extended . . . ;

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<sup>85</sup> *Id.* at 537.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 20 U.S.C. §§ 1681–1688 (2012).

<sup>89</sup> 20 U.S.C. § 1681(a).

<sup>90</sup> *Id.*

<sup>91</sup> *O’Connor v. Davis*, 126 F.3d 112, 113 (2d Cir. 1997) (citing *Murray v. New York Univ. College of Dentistry*, 57 F.3d 234, 248 (2d Cir. 1995)).

<sup>92</sup> *Bowman*, *supra* note 30, at 112.

- (2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or
- (ii) A local educational agency . . . , system of vocational education, or other school system;
- (3)(i) An entire corporation, partnership or other private organization, or an entire sole proprietorship—
  - (A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
  - (B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation.<sup>93</sup>

Since this amendment was added, “courts have consistently interpreted Title IX to mean that if one arm of a university or state agency receives federal funds, the entire institution is subject to Title IX’s proscription against sex discrimination.”<sup>94</sup> In the event of an allegation of discrimination, the Supreme Court has held that, in addition to the federal government withholding funding, individuals have a private right of action to sue on their own behalf and damages are available as a remedy.<sup>95</sup> In addition, the Supreme Court has concluded that Title IX prohibits sexual harassment as a form of sex discrimination.<sup>96</sup>

#### E. Courts Have Not Settled Whether an Internship at a Host Institution Receiving Federal Funding Qualifies as an “Education Program or Activity”

Only one circuit has addressed a harassment or discrimination claim for an unpaid intern under Title IX and thus whether an unpaid internship can qualify as an education program or activity. In *O’Connor v. Davis*,<sup>97</sup> the facts of which were described at the beginning of this Comment, Bridget O’Connor sued Rockland, a state-run hospital for the mentally disabled where she was completing a social work internship.<sup>98</sup> The Second Circuit affirmed the district court’s decision to dismiss

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<sup>93</sup> 45 CFR § 86.2(h).

<sup>94</sup> *O’Connor*, 126 F.3d at 117 (citing *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 271 (6th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993)).

<sup>95</sup> *Bowman*, *supra* note 30, at 112 (citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnet County Pub. Schs.*, 503 U.S. 60 (1992)).

<sup>96</sup> *Id.* (citing *Alexander v. Yale*, 631 F.2d 178 (2d. Cir. 1980); *Franklin*, 503 U.S. 60).

<sup>97</sup> 126 F.3d 112 (2d Cir. 1997).

<sup>98</sup> *Id.* at 113.

O'Connor's Title IX claim.<sup>99</sup> O'Connor argued that Rockland was an education program because it "both receives federal financial assistance either through the state, its patients, or its employees, and also operates 'vocational training through an organized educational program.'"<sup>100</sup> The Second Circuit rejected this argument, concluding that Rockland was not an "education program or activity" as defined in Title IX.<sup>101</sup> The court reasoned that, when clarifying the phrase "program or activity," Congress elected to leave "education" unchanged. Thus, the court argued that Congress intended for an entity falling under the domain of Title IX to "have features such that one could reasonably consider its mission to be, at least in part, educational."<sup>102</sup>

O'Connor argued that Rockland provided her with vocational training, and thus could "be considered to operate an organized educational program."<sup>103</sup> The Second Circuit, however, disagreed, looking to the definition of "institution of vocational education": "a school or institution which has as its *primary purpose* preparation of students to pursue a technical, skilled, or semiskilled occupation or trade . . . , whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study."<sup>104</sup> The Second Circuit concluded that Rockland does not provide education as its "primary purpose," since "it accepts no tuition, has no teachers, has no evaluation process, and requires no regular hours or course of study for its volunteer workers."<sup>105</sup>

Conversely, some courts have concluded that educational or vocational programs at state correctional facilities receiving federal funding qualify as "education programs or activities" under Title IX. For example, in *Jeldness v. Pearce*,<sup>106</sup> the Ninth Circuit noted that Title IX exempts "religious schools, military and merchant marine schools, fraternities, sororities, voluntary youth organizations, beauty programs," and others, but does not provide an exemption for correctional institutions, although Congress has amended the statute several times.<sup>107</sup> "When a statute lists specific exemptions, other exemptions are not to be judicially implied."<sup>108</sup>

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<sup>99</sup> *Id.* at 116.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 117.

<sup>103</sup> *Id.* at 118.

<sup>104</sup> *Id.* (quoting 34 C.F.R. § 106.2(o)) (emphasis added).

<sup>105</sup> *Id.*

<sup>106</sup> 30 F.3d 1220 (9th Cir. 1994).

<sup>107</sup> *Id.* at 1225.

<sup>108</sup> *Id.* (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

The *Jeldness* court also noted that the regulations were not meant to apply solely to “traditional educational institutions.”<sup>109</sup> The court looked to the codified purpose of the regulations: “Title IX . . . is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, *whether or not such program or activity is offered or sponsored by an educational program or institution.*”<sup>110</sup> Lastly, the court stated that Title 45 C.F.R. § 86.11 applies “to every recipient and to each education program or activity operated by such recipient which receives or benefits from federal financial assistance.”<sup>111</sup> The regulations define “recipient” as:

any State or political subdivision, . . . any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance.<sup>112</sup>

This definition does not explicitly limit the scope of Title IX to traditional educational institutions, such as colleges and universities. In the context of unpaid internships, however, the *O'Connor* court determined that Rockland was not comparable to an educational or vocational program at a state correctional facility, noting that “such programs typically provide instructors, evaluations, and offer a particular course of training.”<sup>113</sup>

F. Courts Have Not Settled Whether Title IX Applies to School-Sponsored Internships that Do Not Receive Federal Funding

There is an open question as to whether internships are covered under Title IX when they are sponsored by a university or other educational institution but are hosted by organizations that are not considered “recipients” under Title IX. For example, in *Crandell v. New York College of Osteopathic Medicine (NYCOM)*,<sup>114</sup> the District Court for the

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<sup>109</sup> *Jeldness*, 30 F.3d at 1226.

<sup>110</sup> *Id.* (quoting 45 C.F.R. § 86.1 (emphasis added by court)).

<sup>111</sup> *Id.* (quoting 45 C.F.R. § 86.11).

<sup>112</sup> *Id.* (quoting 45 C.F.R. § 86.2 (h)).

<sup>113</sup> *O'Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997) (citing *Jeldness*, 30 F.3d 1220; *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia*, 899 F.Supp. 659, 668–69 (D.D.C. 1995)).

<sup>114</sup> 87 F. Supp. 2d 304 (S.D.N.Y. 2000).



Southern District of New York held that a clinical internship program required for graduation was subject to Title IX even if the internship was not hosted by a federally funded hospital.<sup>115</sup> The court noted, “Title IX applies to harassment occurring in programs not operated by the recipient if student participation in such programs is required by the recipient, which is exactly the case here.”<sup>116</sup> In this case, medical students were required to take part in clinical rotations as part of their curriculum. School administrators assigned students to these programs, designed and managed their operation, and selected hospital personnel as supervisors.<sup>117</sup> These supervisors were required to receive adjunct faculty status at the school and undergo a regular review process, although the school could not directly hire or fire them.<sup>118</sup>

In addition, language from the Department of Education Office of Civil Rights guidelines suggests that Congress intended internships directly affiliated with colleges and universities to fall within the scope of Title IX. The guidelines regarding education programs and activities refer to “any academic, extracurricular, research, and occupation training, or other education program or activity operated by a recipient which receives federal financial assistance.”<sup>119</sup> The guidelines also provide that programs not wholly operated by recipients qualify if the recipient “requires participation” by any student or if the recipient “facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient.”<sup>120</sup> Although the language of the guidelines does not necessarily suggest liability for the institution hosting the internship placement, it does suggest that education programs required or facilitated by a university at an off-site location fall under the domain of Title IX.

The *O'Connor* court, on the other hand, rejected the argument that Rockland operated an education program. Marymount’s status as an educational institution, the court reasoned, did not impute education program qualities onto Rockland.<sup>121</sup> According to the Second Circuit, the connection between Marymount and Rockland—that Marymount contacted Rockland for the purposes of establishing an internship place-

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 317.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> 34 C.F.R. § 106.31 (a).

<sup>120</sup> 34 C.F.R. § 106.31(d)(1)–(2) (emphasis added).

<sup>121</sup> *O'Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997).

ment and that a Rockland employee evaluated O'Connor—was “insufficient to establish Rockland as an agent or arm of Marymount for Title IX purposes.”<sup>122</sup>

### III. THE PRIMARY BENEFICIARY TEST AS A SOLUTION TO THE FLSA AND TITLE VII UNPAID INTERN CIRCUIT SPLIT

Of the many tests that courts have adopted to determine whether a worker is an employee or an intern under the FLSA and Title VII, the Second Circuit’s primary beneficiary test is the superior test because it is both consistent with Supreme Court precedent and incentivizes internship programs to provide interns with quality educational experiences. Courts should thus abandon use of the economic reality and totality of circumstances tests in favor of the primary beneficiary test. After defending the superiority of the primary beneficiary test over other options in the context of Title VII, this Comment will explore the implications of the primary beneficiary test for harassment and discrimination claims under Title IX as an alternative avenue for relief.

#### A. The Primary Beneficiary Test Is Consistent with Supreme Court Precedent

To begin, *Portland Terminal* does not provide useful guidance for distinguishing between employees and today’s unpaid interns, and total deference is thus unwarranted. First, the opinion of *Portland Terminal* is very fact-intensive, possibly indicating that the Court did not intend for its holding to apply seamlessly to other scenarios. Second, in listing several factors that contributed to its evaluation of whether workers were employees, the Court did not specify that any particular factor was conclusive in reaching its decision.<sup>123</sup> Rather, the Court used the factors as a guide to answer its central question: whether the railroad or the trainees received a greater benefit from the training program.<sup>124</sup> In other words, the Court essentially applied a primary beneficiary test.

Third, the Court decided *Portland Terminal* in a vastly different labor market than today’s, and all of its considerations do not translate

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<sup>122</sup> *Id.*

<sup>123</sup> See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–53 (1947). See also *Glatt v. Fox Searchlight*, 811 F.3d 528, 537 (2d Cir. 2016) (“Nothing in the Supreme Court’s decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace.”).

<sup>124</sup> *Portland Terminal*, 330 U.S. at 152–53. See also Gregory S. Bergman, Comment, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J. L. & PUB. POL’Y 551, 585 (2014) (“The Court did use the factors as a guide to its analysis but held that those factors informed the ultimate inquiry: which party was the primary beneficiary of the work done by the trainees?” (citing *Portland Terminal*, 330 U.S. at 152–53)).

well into the modern workplace. In *Portland Terminal*, railroad workers received training for a particular job.<sup>125</sup> The current internship market tends to provide less specific training to perform a particular task, and instead more intangible benefits. Although some job training takes place, there tends to be a greater focus on “soft skills,” such as “how you articulate your ideas, how you interact with bosses and colleagues, and . . . how you respond to failure,”<sup>126</sup> and on gaining knowledge of an industry and career path.

Similarly, whereas Fact Sheet #71 takes one factor directly from *Portland Terminal*—“the employer that provides the training derives no immediate advantage from the activities of the intern”<sup>127</sup>—the court in *Glatt* rejected this as out of step with the benefits that modern internships provide interns.<sup>128</sup> The *Glatt* court focused on the instant internship program’s academic parallels and particular educational benefits.<sup>129</sup> The court reasoned that whether there is any modicum of immediate advantage “from the internship program will not help to answer whether the internship program could be tied to an education program, whether and what type of training the internship program provided,” and other questions relevant to the benefit the trainee receives.<sup>130</sup> In *Portland Terminal*, although the railroad may not have received an “immediate advantage,” the company still had strong economic incentives to train the workers to have a sufficient labor pool.<sup>131</sup> Today’s internships, on the other hand, are often driven by “students seeking the internships[,] as opposed to a particular company’s business requirements.”<sup>132</sup> The prohibition against any “immediate advantage” is therefore inapplicable when there are otherwise educational benefits to the intern that outweigh the benefit received by the sponsoring organization.

B. The *Glatt* Primary Beneficiary Test Best Incentivizes  
Improvements of the Educational Quality of Internship Programs

The primary beneficiary test may be a misnomer for what the Second Circuit perceives to be really at issue in its analysis of internship

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<sup>125</sup> *Portland Terminal*, 330 U.S. at 149.

<sup>126</sup> *Why Soft Skills Speak Louder*, MONSTER (last visited Jan. 31, 2017), <https://www.monster.co.uk/career-advice/article/why-soft-skills-speak-louder> [<https://perma.cc/BF2E-P7CA>].

<sup>127</sup> U.S. DEPT OF LABOR, WAGE & HOUR DIV., *supra* note 59.

<sup>128</sup> *Glatt*, 811 F.3d at 539.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1213 (11th Cir. 2015).

<sup>132</sup> *Id.*

programs—the magnitude of the educational benefit that unpaid interns receive from their program. The non-exhaustive list of factors the Second Circuit provided in *Glatt* suggests that the court was less concerned with who gains more from the relationship between employer and employee and more focused solely on whether or not the internship provides an educational benefit to its participants. Therefore, even if an employer receives significant benefit from the internship program, the Second Circuit appears not to care as long as the intern learns from her own experience.

Regardless of how much educational benefit a student receives from an internship, because of the reality of today’s hiring processes, students will likely still continue to apply to such programs to build their credentials and obtain whatever advantage they can in the post-graduate labor market. But the primary beneficiary test could incentivize employers to enhance the educational aspects of their internship program in order to avoid wage and hour regulations under the FLSA. It is undoubtedly in a student’s best interest that an internship not only help her get a future job, but also position her to succeed once she starts work. Thus, a primary beneficiary test examining educational benefit will largely enhance the internship experience by incentivizing employers to provide increased training and preparation. Although those incentives will likely leave students in internships without harassment and discrimination protection under Title VII, there is still a possibility for students to seek recourse under Title IX, as discussed later in this Comment.

#### IV. TITLE IX AS AN ALTERNATE PATH FOR GENDER-BASED HARASSMENT AND DISCRIMINATION PROTECTIONS FOR UNPAID INTERNS

The primary beneficiary test will not only ensure better quality internships, but, more importantly, will allow for another avenue of relief—Title IX. If a court finds that an internship is not primarily educational, the intern is an employee, and Title VII protections come into effect. Yet, in the many circumstances when a court finds that an internship *is* primarily educational, although Title VII does not cover the situation, the internship could qualify as an “educational program and activity” under Title IX. Under this framework, internships in host sites that receive federal funding will virtually always<sup>133</sup> have an avenue for

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<sup>133</sup> The court in *Schumann* acknowledged that determining the primary beneficiary of an internship is not always a clear-cut inquiry. Some internships may be neither primarily educational nor primarily non-educational. See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1214–15 (11th Cir. 2015) (“[W]e caution that the proper resolution of a case may not necessarily be an all-

relief for harassment and discrimination: if not through Title VII because the internship is primarily educational, then through Title IX.

This Comment argues that when an internship takes place at an organization receiving federal funding the internship site can be held liable under Title IX regardless of whether this institution is itself a school or traditional place of learning. It further argues that when the internship takes place at an organization that does not receive federal funding, but a college, university, or other educational institution facilitates the internship, the facilitating entity can be held liable, along with the internship host site in some instances.

A. Internships at Organizations Receiving Federal Funding Qualify as “Education Programs and Activities” under Title IX

Whether an unpaid intern receives harassment and discrimination protection under Title IX hinges on whether the internship qualifies as an “education program or activity.” The Second Circuit’s primary beneficiary analysis is useful for determining whether internships meet this standard. If a court using the *Glatt* primary beneficiary test concludes that an internship is primarily educational, the intern is not an employee. But such an internship is more likely to qualify as an education program or activity under Title IX. When using the primary beneficiary test, the court in *Glatt* included five factors that focus exclusively on educational benefits. These factors demonstrate that if an internship primarily benefits the intern, it is because of its educational purpose. If an internship program has education as its “primary purpose,” it satisfies the definition of “institution of vocational education” under Title IX. Under this reading, interns in these programs should therefore benefit from Title IX harassment and discrimination protections.

To rebut this approach, an institution employing unpaid interns might argue that, although the primary purpose of the internship program might be educational, the institution as a whole does not have education as part of its mission, and therefore it is exempt from Title IX. The *O'Connor* court makes this argument: “[W]e think it evident that in order to implicate Title IX in the first instance, an entity must

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or-nothing determination. That is, we can envision a scenario where a portion of the student’s efforts constitute a *bona fide* internship that primarily benefits the student, but the employer also takes unfair advantage of the student’s need to complete the internship by making continuation of the internship implicitly or explicitly contingent on the student’s performance of tasks or his working of hours well beyond the bounds of what could fairly be expected to be a part of the internship.”) Using the framework this Comment proposes, it is possible that neither Title VII nor Title IX would provide relief for harassment and discrimination protection in these cases, although a finding that an internship has at least a partial educational purpose still would inform the Title IX analysis.

have features such that one could reasonably consider its mission to be, at least in part, educational.”<sup>134</sup> The legislative history, however, indicates that this distinction was not important to Congress. The Senate Report of the Civil Rights Restoration Act of 1987 states:

If a private hospital corporation is extended federal assistance for its emergency room, all of the operations of the hospital, including for example, the operating rooms, the pediatrics department, admissions, discharge office, etc., are covered under Title VI, section 504, and the Age Discrimination Act. Since Title IX is limited to education programs or activities, it would apply only to the students and employees of educational programs of the hospital, if any.<sup>135</sup>

Even in the case of academic hospitals affiliated with major research universities, no one would reasonably argue that education is part of a typical hospital’s mission; rather, a hospital primarily serves its patients. By acknowledging that education programs or activities at a private hospital would fall under the domain of Title IX, the Senate makes clear its intention that the domain of Title IX extends beyond traditional high schools, colleges, and universities. Institutions with a primary focus outside of education should therefore fall under Title IX, as long as a vocational program operating within the institution has education as its primary purpose.

Furthermore, a small number of courts have found that Title IX applies to institutions outside of schools, colleges, and universities. In *Sternberg v. U.S.A. National Karate-Do Federation, Inc.*,<sup>136</sup> for example, the Eastern District of New York held that the withdrawing of a women’s but not a men’s karate team from international competition is a recognizable claim under Title IX because the Karate Federation’s mission, by running training programs, is at least in part educational.<sup>137</sup> In *Jeldness*, as another example, a correctional facility qualified as recipient under Title IX.<sup>138</sup>

Prisons, however, may be an inapplicable example to demonstrate that Title IX can apply outside of traditional educational institutions. Although briefly, the legislative history of Title IX explicitly mentions prisons, possibly indicating that Congress intended for jails and prisons

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<sup>134</sup> O’Connor v. Davis, 126 F.3d 112, 117 (2d Cir. 1997).

<sup>135</sup> S. Rep. No. 100-64, 109th Cong., 1st Sess. at 18–19 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 20.

<sup>136</sup> 123 F. Supp. 2d 659 (E.D.N.Y. 2000).

<sup>137</sup> *Id.* at 662.

<sup>138</sup> *Jeldness v. Pearce*, 30 F.3d 1226 (9th Cir. 1994).

to qualify under Title IX but did not intend for other institutions outside of schools and universities to qualify. The Senate Report for the Civil Rights Restoration Act of 1987 noted, “Prolonged debate takes place over what constitutes a ‘program of activity’ under the civil rights law, while the universities, schools and *correctional facilities* receive millions of dollars.”<sup>139</sup>

A straightforward analysis of the regulation, however, confirms that programs at institutions without education as a focus of their missions may fall under Title IX. The act states, “[T]his part 86 [pertaining to nondiscrimination on the basis of sex in educational programs or activities receiving federal financial assistance] applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.”<sup>140</sup> As stated before, the regulation defines “recipient” as:

any State or political subdivision thereof, . . . any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.<sup>141</sup>

The regulation does not limit coverage of Title IX to institutions traditionally considered to have education as their primary purpose, such as high schools and colleges. Rather, any “public or private agency, institution, or organization, or other entity” receiving federal financial assistance and operating an “education program or activity” falls under its domain.<sup>142</sup> It does not limit its definition to institutions with education as part of their mission.

Furthermore, regarding prisons, one could argue that the very term “correctional facility” suggests that a purpose of the institution is to rehabilitate, and therefore educate, its occupants, and that correctional facilities fall in the same general category of traditional institutions of education as universities and schools. While Congress has deemed providing “the defendant with needed educational or vocation training” a valid purpose of incarceration,<sup>143</sup> a sentencing court may not

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<sup>139</sup> *Id.* at 1225 (quoting S.Rep. No. 100-65, 100th Cong., 2d Sess. 11 (1988), *reprinted in* 1988 U.S. Code & Admin. News 3, 13)).

<sup>140</sup> 45 CFR § 86.11.

<sup>141</sup> 45 CFR § 86.2(h)(4)(i).

<sup>142</sup> *Id.*

<sup>143</sup> 18 U.S.C. § 3553(a)(2)(d).

impose or lengthen a prison term in order to foster a defendant's rehabilitation.<sup>144</sup> Education, arguably, cannot be a key part of a prison's mission. This follows intuitively, as jails and prisons do not come to mind as places of learning in the same way that schools and universities do.

Lastly, Title IX may provide the only avenue for federal relief from harassment and discrimination for unpaid interns working at nonprofit organizations and government agencies, which sponsor forty percent of unpaid internships.<sup>145</sup> The *Glatt* court limited its holding only to interns at for-profit entities.<sup>146</sup> Additionally, many scholars have argued that unpaid internships at charitable nonprofits fall within the scope of the "volunteer exception" to the FLSA, and courts therefore never consider interns in these settings to be employees.<sup>147</sup> Title IX, on the other hand, would cover internships at nonprofit and government agencies if they qualify as education programs or activities.

#### B. Title IX Should Apply to School-Sponsored Off-Site Internships Even If the Hosting Location Does Not Receive Federal Funding

If an internship site does not receive federal funding, the hosting institution cannot be held liable under Title IX. If, however, a school, university, or other institution that does qualify as a recipient under Title IX sponsors or in some way facilitates an off-site internship, the recipient should be held liable under Title IX for any incidents of sexual harassment or gender discrimination that occur at the host site. In *Crandell*, the Southern District of New York held that a clinical clerkship, which NYCOM required for graduation from medical school and that took place at a non-university run hospital, was subject to Title IX, even though the hospital did not receive federal funding.<sup>148</sup> The court

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<sup>144</sup> United States v. Tapia, 131 S. Ct. 2382, 2385 (2011).

<sup>145</sup> Thomas Johnson, Comment, *The Fox Searchlight Signal: Why Fox Searchlight Marks the Beginning of the End for Preferential Treatment of Unpaid Internships at Nonprofits*, 102 VA. L. REV. 1127, 1129 (2016).

<sup>146</sup> *Glatt v. Fox Searchlight Pictures, Inc.* 811 F.3d 528, 536 n.2 (2d Cir. 2015) ("Like the parties and amici, we limit our discussion to internships at for-profit employers.").

<sup>147</sup> Johnson, *supra* note 145, at 1143 (citing Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 600–02 (2014); Maurice S. Pianko, *Dealing with the Problem of Unpaid Interns and Nonprofit/Profit-Neutral Newsmagazines: A Legal Argument that Balances the Rights of America's Hardworking Interns with the Needs of America's Hardworking News Gatherers*, 41 RUTGERS L. REV. 1, 36–37 (2014); Emily Bodtke, Note, *When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act to Distinguish Employees from Volunteers*, 99 MINN. L. REV. 1113, 1122–23, 1123 n.71 (2015)). For a more thorough discussion of the volunteer exception of the FLSA, including the DOL's interpretation and counterarguments to these commentators, see Johnson, *supra* note 145, at 1143–51.

<sup>148</sup> *Crandell v. New York College of Osteopathic Medicine (NYCOM)*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000).



looked to the language of Title IX, which states that its regulations apply to “programs not wholly operated by the recipient [of federal funds] if the recipient ‘requires participation’ by any student therein or the recipient ‘facilitates, permits, or considers such participation as part of or equivalent to any education program or activity operated by such recipient.’”<sup>149</sup> Because NYCOM required clinical rotations for graduation, the court reasoned that the clinical rotations clearly fit within the statute. Other university-required or university-facilitated internships, such as those that are not mandatory but where a student participates in the internship for academic credit, should therefore be subject to Title IX.

On the other hand, in *Crandell*, there is a closer affiliation between the school and hosting hospitals than in many off-site internships. Recall that NYCOM required supervisors to receive adjunct faculty status and undergo reviews by a committee of faculty members, and that NYCOM faculty designed and managed the program.<sup>150</sup> Some may argue that the strong relationship between the school and hospital distinguishes this case from other off-site internships that maintain a much less structured relationship between the sponsoring university and internship placement site. This, however, is not necessarily the case if one looks to the spirit of the court’s reasoning and the text of Title IX. First, the district court concluded that Title IX applies when a plaintiff alleged “a nexus between the off campus misconduct and a hostile environment at the institution.”<sup>151</sup> This reasoning should apply to other cases where incidents of harassment and discrimination cause a student to fear repercussions at her home educational institution, such as failing a course or failing to obtain a recommendation, even in the absence of a strong relationship between the sponsoring and hosting institutions. Second, there is some ambiguity in what it means for a recipient to “facilitate, permit, or consider[ ] such participation as part of or equivalent to an education program or activity operated by such recipient.”<sup>152</sup> If a university provides academic credit for an internship, even if the internship is not mandatory for graduation, the program should qualify, since the university must consider it the equivalent of an education program or activity by offering academic credit. Furthermore, if a university plays a role in helping the student locate the internship, possibly through the career services office, even if not for academic credit, it

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<sup>149</sup> *Id.* at 317.

<sup>150</sup> *Id.* at 312.

<sup>151</sup> *Id.* at 316.

<sup>152</sup> *Id.* at 317.

should arguably also qualify as “facilitating” or “permitting” the internship.<sup>153</sup>

In these cases, the school would be liable for incidents of harassment and discrimination occurring at the internship site. In some instances, however, the status as an education program may be imputed from a school to a non-federally funded host site. *O'Connor* explicitly states this was not the case in the situation before the court, but suggested that some factors could have led the court to a different conclusion: “institutional affiliation,” a written agreement binding the two entities, shared staff, funds circulating between the two institutions, and repeated student interns.<sup>154</sup>

## V. CONCLUSION

Currently, the nearly two-thirds of students who participate in unpaid internships at some point in college work without federal protection from harassment and discrimination.<sup>155</sup> Companies, nonprofit organizations, and government agencies can discriminate in hiring interns and during the course of the internship, and such employers can both perpetuate and condone hostile work environments for interns without fear of legal repercussions under Title VII. Because internships function as a significant pipeline to employment in many industries, the lack of protections for unpaid interns not only harms the individual intern by denying legal recourse, but also harms efforts to promote the broader advancement of gender equality in the workplace.

For interns to warrant protection from harassment and discrimination under Title VII, the interns must qualify as employees. Of the tests that appellate courts utilize to assess whether an unpaid intern qualifies as an employee, the primary beneficiary test that the Second Circuit promulgates in *Glatt v. Fox Searchlight Pictures, Inc.* best addresses the question because it follows Supreme Court precedent and focuses on the educational benefit interns receive. Although the primary beneficiary test has not yet allowed an intern to receive Title VII

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<sup>153</sup> One may fear that, if universities could be held liable under Title IX for facilitating internships, the universities would stop facilitating internships as a result of increased Title IX liability. However, concerns regarding employment outcomes coupled with the perceived necessity of an internship to enter many fields may just as likely incentivize universities to ensure appropriate safeguards are in place against harassment and discrimination before sending students to internship sites. The effect of this interpretation of Title IX liability is an empirical question outside the scope of this Comment.

<sup>154</sup> *O'Connor v. Davis*, 126 F.3d 112, 118 (2d Cir. 1997). For an interesting discussion about contractual solutions to hold both universities and internship host sites accountable for incidents of harassment and discrimination that occur when a student is working an off-site unpaid internship as part of a degree requirement, see Bowman, *supra* note 30.

<sup>155</sup> NAT'L ASS'N OF COLLS. & EMP'RS, *supra* note 12.

protections, it aids the analysis for relief under Title IX. When courts deny Title VII protections to an intern because the internship is primarily educational under the primary beneficiary test, the internship is more likely to qualify as an education program or activity under Title IX.. This logic denies interns the benefits of wage and hour protections under the FLSA, but at least provides them with a form of legal recourse for gender-based harassment and discrimination. If the internship site does not receive federal funding, options for recourse still may exist under Title IX if an intern's school is a recipient of federal funding and sponsors the internship through academic credit or other means.